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FILED
JUL 26 1983

No. 82-2157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,

Petitioners,

vs.

CENTRAL TRANSPORT, INC., et al.,

Respondents.

MOTION OF BRICKLAYERS FRINGE BENEFIT FUNDS — METROPOLITAN AREA, ET AL., FOR LEAVE TO FILE BRIEF AMICI CURIAE

BRIEF OF BRICKLAYERS FRINGE BENEFIT FUNDS — METROPOLITAN AREA, ET AL., AMICI CURIAE

15 pp

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The Bricklayers Fringe Benefit Funds — Metropolitan Area, the Carpenters Fringe Benefit Funds — Detroit and Vicinity, the Cement Masons Fringe Benefit Funds — Detroit and Vicinity, the Electrical Workers Fringe Benefit Funds of Local Union #58, IBEW, and the Laborers Fringe Benefit Funds — Detroit and Vicinity move to intervene in this case as amici curiae for purposes of submitting the attached brief. The consent of the attorney for the petitioners has been obtained. The consent of the attorneys for the respondents was requested but refused.

The amici are composite names for trust funds[1] established under, and administered pursuant to, Section 302 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §186, and the Employee Retirement Income Security Act of 1374, as amended, 29 U.S.C. §§1001, *et seq.* In this respect, they have the same legal status as petitioners. Amici operate to provide pension, medical, hospitalization, dental, holiday and vacation pay, optical and other benefits to workers in the construction industry in southeastern Michigan. Each is a multi-employer, jointly administered employee benefit plan created by collective bargaining.

Amici believe that the Sixth Circuit's opinion of January 20, 1983, was, at the very least, overly broad and, by its sweep, will, unless corrected, do serious damage to the public policy favoring protection of employee benefit plans and to the statu-

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[1]The "Bricklayers Fringe Benefit Funds — Metropolitan Area" include the Bricklayers Pension Trust Fund — Metropolitan Area, the Bricklayers and Trowel Trades International Pension Fund, the Bricklayers Holiday Trust Fund — Metropolitan Area, the Detroit and Vicinity Trowel Trades Health and Welfare Fund, and the Bricklayers Joint Apprenticeship Committee.

The "Carpenters Fringe Benefit Funds — Detroit and Vicinity" include the Carpenters Pension Trust Fund — Detroit and Vicinity, the Carpenters Vacation and Holiday Trust Fund — Detroit and Vicinity, and the Carpenters Health and Welfare Fund — Detroit and Vicinity.

The "Cement Masons Fringe Benefit Funds — Detroit and Vicinity" include the Cement Masons Pension Trust Fund — Detroit and Vicinity, the Bricklayers and Trowels Trades International Pension Fund, the Cement Masons Vacation and Holiday Trust Fund — Detroit and Vicinity, and the Detroit and Vicinity Trowel Trades Health and Welfare Fund.

The "Electrical Workers Fringe Benefit Funds of Local Union #58, IBEW" include the Electrical Workers Pension Trust Fund of Local Union #58, IBEW, the Electrical Workers Joint Board of Trustees Vacation Fund, the Electrical Workers Insurance Fund, the Supplemental Unemployment Benefit Fund of the Electrical Industry, Detroit, Michigan, the National Electrical Benefit Fund, and the Joint Apprenticeship Training Trust Fund.

The "Laborers Fringe Benefit Funds — Detroit and Vicinity" include the Laborers Pension Trust Fund — Detroit and Vicinity, the Laborers Vacation and Holiday Trust Fund — Detroit and Vicinity, and the Laborers Metropolitan Detroit Health and Welfare Fund.

tory requirement, in furtherance of that policy, that such plans be properly funded. There are critical policy and practical considerations which amici believe the Court of Appeals either failed to consider or misapprehended. In the interests of the participants for whose sole and exclusive benefit amici exist and the thousands of workers and beneficiaries similarly situated, amici request leave to file the attached brief.

Respectfully submitted,

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Amici, Bricklayers Fringe Benefit Funds — Metropolitan Area, Carpenters Fringe Benefit Funds — Detroit and Vicinity, Cement Masons Fringe Benefit Funds — Detroit and Vicinity, Electrical Workers Fringe Benefit Funds of Local Union #58, IBEW, and Laborers Fringe Benefit Funds — Detroit and Vicinity, are composite names[1] for various employee pension and welfare benefit plans covering workers in the construction industry in southeastern Michigan and, in many respects, their families. All were established under and are administered pursuant to the Labor-Management Relations Act of 1947, as amended ("LMRA"), 29 U.S.C. §186, and the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§1001, *et seq.*

[1]See note 1 in the (attached) Motion of Bricklayers Fringe Benefit Funds — Metropolitan Area, et al., for Leave to File Brief Amici Curiae. The interest of the amici is stated in the motion.

Amici have not made a detailed review of the trial court record in this case. Insofar as the decision of the Court of Appeals for the Sixth Circuit rested on the details of the documents submitted or the particular agreed-upon relationships among the parties, we have no comment to make. It is the breadth of the opinion which concerns us.[2] We are fearful that application of the principles set out there will, at least in the construction industry, frustrate our efforts to conform to the standards of diligence in collecting contributions imposed by statute and regulation.

This brief will be limited to a brief discussion of the matters which we urge need to be given greater consideration, particularly in respect to industries like the construction industry, than they were in the Sixth Circuit's opinion.

1. As a prefatory comment to our discussion, it should be noted that, in reaching its conclusion, the panel drew heavily upon the Eighth Circuit's decision in *Central States, Southeast and Southwest Areas Pension Fund* v *CRST, Inc.*, 641 F.2d 616 (1981). After the Sixth Circuit's decision in the instant case, the Eighth Circuit, *en banc*, overruled the *CRST* holding, *Robbins* v *Prosser's Moving and Storage Company*, 700 F.2d 433 (Feb. 16, 1983).[3]

Although the narrow issue of the *Robbins* case was whether the trustees of benefit funds were required to exhaust arbitration provisions of a collective bargaining agreement before instituting a collection suit, many of the policy considerations involved in this case were discussed at some length in the Eighth Circuit's *en banc* opinion. In deciding *Robbins*, the Court took cognizance of the Sixth Circuit's opinion in the

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[2]The Sixth Circuit's panel decision in the instant matter appears to be diametrically in conflict with another panel's (unreported) decision. See *Hughes* v *Baker Cement Contractors, Inc.*, C.A. 6, No. 81-3307 (July 6, 1982), reprinted in the appendix to this brief.

[3]The Eighth Circuit stated, "On reflection, however, we believe that [the cited cases including *CRST*] were not correctly decided." 700 F.2d, at 438. See also the entire discussion at p. 438 of the opinion.

instant case. *Robbins*, 700 F.2d, at 445, n. 7 (dissenting opinion).

2. ERISA imposes a fiduciary duty upon trustees of employee benefit plans to collect contributions. One of the earliest interpretative statements concerning ERISA by the Department of Labor or the Internal Revenue Service, the two agencies charged by the statute with enforcement in respect to continuing plans, dealt with this subject. While setting out the conditions under which trustees could agree to installment payment plans of overdue contributions from delinquent employers, the Department of Labor made it plain that such agreements were extensions of credit prohibited by ERISA and that trustees were required to make "systematic, reasonable and diligent efforts to collect delinquent contributions." Prohibited Transaction Exemption 76-1 (March 23, 1976), 41 FR 12740. One of the necessary elements of any systematic effort by multi-employer fringe benefit programs to collect amounts owing — which must, after all, be determined before they can be collected — is the audit.

Typically, multi-employer plans such as petitioners and amici depend upon a system of employer self-disclosure. Weekly or monthly, each employer fills out report forms setting out the names of the employees performing bargaining unit work, hours worked and/or wages earned and such other information as is required for the calculation of contributions due and for the administration of the fringe benefit program. The employer then calculates the contribution due (ordinarily, an amount equal to a percentage of wages or an amount multiplied by the number of hours, days or weeks worked or paid, depending upon the agreed-upon formula) and mails the completed form and a check for the amount shown to be due to the fund office or a depository bank.

The fund ordinarily has no method of independently verifying or challenging the amounts said by the employer to be due. All of the information is in the employer's possession. None is in the fund's.

The fund must, therefore, develop devices intended to disclose potential problem areas or to bring forward information from other sources (e.g., employees, former employees, unions, public information, other employers) which tends either to confirm or to question the information supplied by the employer. Ultimately, however, the proof must come from the employer's own records, which means by audit.[4]

3. For the audit to have any value, the auditor must have available to him all documents required to determine the accuracy of the fringe benefit contribution reports. No one employer record by itself is sufficient to allow the sort of crosschecking the auditor must engage in to make judgments about authenticity and completeness. For example, an employer may record payments to certain employees through the general disbursements book rather than payroll records, or the employer may be misclassifying employees or classifying certain employees as "independent contractors" to evade obligations under the tax laws and/or the collective bargaining agreement.[5] In such situations an audit confined to those records identified by the employer itself as "payroll records of affected employees" would be more likely to conceal than reveal the delinquency.

4. The difficulties are even greater in the kinds of industries which developed multiemployer benefit plans. Small employers or a mixture of large and small employers sharing a pool of workers are characteristic of those industries: trucking, retail trades, garment, maritime, entertainment and construction. Multiemployer plans were created through collective bargain-

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[4]See *Jim McNeff, Inc.* v *Todd*, — U.S. — , 103 S.Ct. 1753, 75 L.Ed.2d 830 (April 27, 1983). In that case, it was an audit which disclosed that the employer owed several thousand dollars in trust fund contributions.

[5]In *Jim McNeff, Inc.* v *Todd*, cited in note 4, *supra*, this Court noted that the employer had submitted reports to the funds containing "the false notation that 'no members of this craft were employed during this month.'" Had the funds in that case been limited in their audit procedures as the Sixth Circuit would limit petitioners in this case, the shortages would never have been found.

ing to provide a means for workers in those industries and their families to achieve a measure of the health and retirement security which workers involved in large single employer plans already had.

Consider the relevant characteristics of the construction industry in which amici operate. Individual carpenters or cement finishers or laborers may work for one or dozens of employers each year. If there is a hiatus in available work at one jobsite because of supply or scheduling problems (not uncommon), the worker may find a short job on another jobsite for the same or a different employer or a different company of the same employer.

The fringe benefit funds will ordinarily have no way of knowing by whom a given participant worker is employed, or even if the worker is employed, until the employer contribution forms are received. The transient nature of employment in the industry[6] is another factor which leaves the funds at the mercy of employer probity and accuracy and requires broad access to records when audits are performed.[7]

5. All of this is further aggravated by the fact that the benefit funds are involuntary creditors and that the debt "has a unique aspect," in that "the party with the responsibility for collection of the debt does not have apparent ability to with-

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[6]See part II of the opinion in *Jim McNeff, Inc.* v *Todd, supra.*

[7]Although the context of the case differs from the instant one, the following language from then District Judge Cornelia Kennedy's (unreported) opinion in *Laborers' Pension Trust Fund — Detroit and Vicinity, et al.*, v *Frank Bizzocchi Cement Construction Company, Inc.*, U.S.D.C., E.D. Mich., Civ. #74-72450 (Oct. 29, 1975), applies here:

> "Many members of the laborers union work for several employers during a given year and work only portions of the year. Thus, the amounts received by any one employee may differ, making it impossible for the union or the funds to secure this information directly from members. Many laborers have limited education and unless they receive the vacation and holiday benefits through their union organization may not know whether they have received the correct amount or not." (Slip Opinion, at 3.)

hold credit." *Laborers' Fringe Benefit Funds — Detroit and Vicinity* v *Northwest Concrete & Construction, Inc.*, U.S.D.C., E.D. Mich., Civ. #78-71765 (June 25, 1979), rev'd on other grounds, 640 F.2d 1350 (C.A. 6, 1981). The trustees have nothing to do with the establishment of the basic contractual arrangement which obligates the employer. They cannot refuse to deal with an employer which has signed the requisite collective bargaining agreement even if they believe that employer to be financially irresponsible. To the extent that credit is extended, they have no voice in the terms of the extension and, unless the collective bargaining agreement or the applicable trust agreement specifically so provide, they cannot make a demand from a given employer for security to assure payment of the obligation, regardless of how impecunious the employer might be. Although the union may have some power to "police" the industry, and its power in the construction industry is often considerably exaggerated, the benefit funds have none.[8]

6. The opinion of the Court of Appeals suggests that there are solutions to some of these difficulties encountered by the trustees. With respect, we believe that the "solutions" are illusory.

A. Contrary to what the court stated, the union and the benefit funds do not necessarily have an identity of interests. One of the principal purposes of the Taft-Hartley requirement of joint union-management administration of such funds was to moderate the level of fund-union identity and ERISA has, of course, made it even clearer that trustees must act for the benefit of the participants, not the unions or the companies. See, e.g., *National Labor Relations Board* v *Amax Coal Company*,

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[8]Even the workers' collective bargaining agent, however, may not insist upon such security as part of a collective bargaining agreement. To do so is an unfair labor practice. *Local 164, Brotherhood of Painters* v *National Labor Relations Board*, 293 F.2d 133 (C.A.D.C., 1961); *Lathers Local 42 and Lathing Contractors Association of Southern California*, 223 NLRB 37 (1976).

453 U.S. 322, 101 S.Ct. 2789, 69 L.Ed.2d 672 (1981), *Hughes* v *Baker Cement Contractors, Inc., supra*,[9], *Robbins*, 700 F.2d, at 439-442, and *Ambromovage* v *Thomas*, 3 EBC 1872, 1878, 1883-1886 (U.S.D.C., M.D., Pa., Civil #8796, July 9, 1982).

B. The "estoppel argument" for subsequently denying benefits to a worker whose employer has cheated, with or without the employee's connivance, can hardly justify the panel's conclusion. First, it is far from certain that this "defense" is available to the funds when an employee sues for benefits. See, e.g., *Robbins*, 700 F.2d, at 441. Thus, to use the Eighth Circuit's expression, the funds are "in danger of being whipsawed". *Ibid.* Second, it fails to take into consideration the inequality of the distribution of power between employer and employee (particularly during hard times). The employer, in clear violation of the agreement, can force an employee as a condition of keeping his job not to complain about the employer's failure to make necessary contributions, a danger of great magnitude when the economy is in a state of recession or depression. Finally, it fails to take into consideration the fact that some employees are too uneducated, either generally or in the mechanisms by which their benefit funds operate, or too unsophisticated to know that they are being cheated.[10]

C. For practical purposes, the recoupment remedy suggested by the Sixth Circuit panel simply does not exist. By the time the cause will have accrued, there is a distinct possibility that the employer will no longer be in business or have sufficient assets to satisfy any judgment. The construction industry is an industry of transient employers as well as transient employees, an industry in addition to which multiple corporate or other forms for a single employer — with all the legal problems of identification and collection that brings — are commonplace. It

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[9]See note 2, *supra*.

[10]See note 7, *supra*.

is also an industry in which undercapitalization of a single employer, known or unknown to its employees, is masked by the endemic division of capital (lender, developer, builder) and the employing unit (contractor, subcontractor). If the employer is still around and collectible when the funds come looking for him, the principal defense the employer will use is, or course, "estoppel".

7. The audit is the most efficacious means of assuring compliance with the fringe benefit provisions of the contract. To the extent the auditor is deprived of the necessary tools, cheating is more likely to go undetected. To the extent it does, the actuarial foundation of the particular fund is threatened, all beneficiaries face a possible loss or diminution of benefits and/or those employers who are fully meeting their fringe benefit funding obligations are placed at a competitive disadvantage in the short run and at risk of having to make up funding shortfalls caused by the cheaters in the long run.

8. Granting the auditor more or less unrestricted access to an employer's books and records may, we recognize, give rise to the possibility of abuse or to a potential invasion of privacy of non-covered employees. Where these are real possibilities and not ruses to justify denial of access to revelatory records, the District Court has ample power to fashion an appropriate protective order.

CONCLUSION

Amici respectfully submit that the Sixth Circuit, focusing too exclusively on the possibilities of abuse and invasions of privacy, failed to give appropriate consideration to the practical and policy difficulties which would be caused by the application of the restrictive principles it enunciated. The focus, we urge, more properly belongs on protecting the participants of employee benefit plans and safeguarding the fiscal integrity of those plans. That court's decision, if allowed to stand, would frustrate that public policy, enunciated in ERISA.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: July 8, 1983.

APPENDIX

(Unreported) decision of U.S. Court of Appeals
for the Sixth Circuit in
Hughes v *Baker Cement Contractors, Inc.*,
No. 81-3307 (July 6, 1982)

NO. 81-3307
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THURMAN HUGHES, ANTHONY D. LIBERATORE, MARTIN MASON, CHARLES PEARL, RICHARD STANDER, JR., PAUL SWEITZER, DREXEL J. THRASH and RICHARD L. WALLER, TRUSTEES of the OHIO LABORERS' DISTRICT COUNCIL-OHIO CONTRACTORS' ASSOCIATION INSURANCE FUND;

and

W. W. LATHROP, JR., JAMES BYRD, DONALD W. FITTON, JR., FORREST W. HUFF, TOM MOORE, DREXEL J. THRASH, CHARLES McKEE, and JOHN CALDWELL, TRUSTEES of the LABORERS' DISTRICT COUNCIL AND CONTRACTORS' PENSION FUND OF OHIO;

and

W. JOE NIEDHARDT, DREXEL J. THRASH, MARSHALL L. FLYNN, JACK E. KUEBLER, AMOS JACKSON, ROBERT F. BLIEILE, GERALD JONES and WILLIAM COPELAND, TRUSTEES of the OHIO LABORERS' TRAINING AND UPGRADING FUND,

Plaintiffs-Appellants,

vs.

BAKER CEMENT CONTRACTORS, INC.,

Defendant-Appellee.

ORDER

(Filed July 6, 1982)

Before: ENGEL and BROWN, Circuit Judges; and GUY, District Judge.*

*Honorable Ralph B. Guy, Jr., District Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

This matter is before this court as a result of plaintiffs' appeal of a summary judgment granted in favor of the defendant in the district court.

Plaintiffs are the Trustees of the Ohio Laborers' District Council-Ohio Contractors' Association Insurance Fund, the Laborers' District Council and Contractors' Pension Fund of Ohio, and the Ohio Laborers' Training and Upgrading Trust Fund. These three funds are collectively bargained, multi-employer, Taft-Hartley fringe benefit funds established by agreements and declarations of trusts between the Labor Relations Division of the Ohio Contractors' Association, the Associated General Contractors of America, Inc., and Employers' Association and the Laborers' District Council of Ohio of the Laborers' International Union of North America, AFL-CIO, an association of a local laborers' union in Ohio.

The defendant is an Ohio corporation engaged in the building and construction industry within the State of Ohio.

On June 1, 1975, defendant became signatory to a collective bargaining agreement that had been negotiated between the Butler County Area Contractors' Association of Hamilton, Ohio, an association of employers, and Laborers' Local No. 534, a local union affiliated with the Ohio Laborers' District Council. This collective bargaining agreement obligated the defendant to make contributions to certain trust funds on behalf of its laborers who work within the geographical jurisdiction of Local 534, whether or not such laborers were in fact union members. Subsequent to entering into this collective bargaining agreement, the defendant, on October 13, 1975, executed another agreement entitled "Assent of Participation," which agreement bound the defendant insofar as trust fund contributions were concerned to the Ohio Laborers' District Council and the local unions of which it is comprised. Pursuant to these two agreements, the defendant made monthly fringe benefit contributions to the trust funds in question on behalf of those members of its work force performing laborers' work. On July 25, 1977,

plaintiff Trustees, pursuant to the relevant contract provisions, requested permission of defendant to perform an audit of its payroll records in accordance with the above-referenced agreements. On November 30, 1977, the audit was commenced but was not completed when the defendant advised the auditor that it would not provide payroll or other related records for employees other than those identified by the *defendant* as laborers on whose behalf a monthly contribution was owed. As a result of this refusal to make the requested records available, the plaintiffs instituted this action against the defendant.

At the final pretrial conference held in the trial court, the parties were directed by the district judge to present this matter on cross-motions for summary judgment rather than by way of trial. Pursuant to this direction, cross-motions for summary judgment were filed and, on April 21, 1981, the district judge entered an order of summary judgment essentially finding in favor of the defendant.

Plaintiffs, defendant, and the trial court were all in agreement that the plaintiffs are entitled to review such records as are necessary to fulfill their obligations under the collective bargaining agreement and the trust fund agreements. By implication at least, the parties are also in agreement that sufficient information was not furnished by the defendant to the plaintiffs in order for them to make a complete determination as to whether fringe benefit funds are being contributed by the defendant as required. The district court held, however, that the release of all the information requested by the plaintiffs would necessarily require the disclosure of additional information which was not needed by the plaintiffs and which the court deemed confidential in nature insofar as the employer was concerned. The trial court further concluded that the information that the Trustees needed was available from another source, i.e., the Union, and that therefore the missing information that they needed to complete their audit could be obtained by resorting to the Union and its records.

Although this appeal poses interesting questions which are being raised with increasing frequency as a result of the passage of the Employees' Retirement Income Security Act of 1974 (ERISA), this court concludes that it is unnecessary to reach those questions in order to determine this appeal. The decision of the trial court that the plaintiffs were entitled to the type of information that they sought in this lawsuit but could obtain it from other sources is erroneous and not supported by the record.

The trial court recognized that plaintiffs should not be wholly dependent upon the defendant's identification of who was working as a laborer and thus entitled to fringe benefit fund contributions. The court concluded, however, that because there was a Union security agreement in the collective bargaining agreement requiring all laborers to be Union members and, further, because the collective bargaining agreement provided for union stewards to be at each job site, that the Union would thus be able to definitively ascertain and identify those employees performing laborers' work on whose behalf contributions had to be made. This conclusion is fatally defective for two reasons.

First, defendant's collective bargaining agreement with Local 534 contained a "grandfather clause" which required that only those laborers hired after the effective date of the agreement, June 1, 1975, become members of Local 534. Thus, the defendant could have non-Union laborers on its payroll without being in violation of its agreement with Local 534.

Second, although the Assent of Participation agreement signed by the defendant also obligated it to make trust fund contributions in the geographic areas covered by Locals 423, 410, and 265, the defendant was not in fact signatory to any collective bargaining agreements with these other three unions. Thus, although the standard collective bargaining agreements of Locals 423, 410, and 265 contained "union security clauses," they were not binding upon the defendant because it had no

direct contractual relationship with these unions. Thus, the defendant could perform work in the geographic areas of these unions and use non-union labor. These two examples clearly demonstrate that there were at least two groups of employees of indefinite size for whom the employer was required to make trust fund contributions but whose eligibility for same could not be determined from Union records.

In addition, undue emphasis is placed upon the fact that in the geographic area under the jurisdiction of Local 534 there was to be a union steward on the job. One of the significant purposes achieved by the passage of ERISA was to set up independent trust funds and trustees with fiduciary responsibilities. This was for the purpose of protecting the employee against both management and the union. To suggest that the union steward is the ultimate safeguard as to who is doing laborers' work overlooks the fact that Congress, by the passage of ERISA, legislatively determined that employee retirement income and fringe benefits should not be left to the protection solely of management or union, but required the protection of an independent board of trustees.

Since the major premises on which the trial court determined that the plaintiffs could in fact achieve access to the information they needed are incorrect, it is necessary to reverse the summary judgment by the district court and remand for such further proceedings as will enable the plaintiffs to secure the information necessary for them to meet their fiduciary responsibilities under ERISA.

By way of further guidance to the parties on remand, this court would further note that it would not appear that a referral of this matter to arbitration is an appropriate vehicle for the resolution of this dispute at its current level. It may be that ultimately the parties will have a disagreement as to whether a given employee is performing laborers' work. Such a determination may or may not be properly referrable to arbitration based upon the provisions of the particular bar-

gaining agreements involved, but arbitration is not an appropriate vehicle for determining the nature and scope of the records to which plaintiffs should have access. The court would further note that the case of *Central States, Southeast and Southwest Areas Pension Fund* v *C.R.S.T., Inc.*, 641 F2.d 618 (8th Cir. 1981), appears to be distinguishable from the case at bar on its facts.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk